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One Tire, One Time: The Supreme Court of Missouri's Expansion of Reasonable Suspicion

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NOTE

One Tire, One Time: The Supreme Court of Missouri's Expansion of Reasonable Suspicion

State v. Smith, 595 S.W.3d 143 (Mo. 2020) (en banc).

Luke A. Hawley[*]

I. INTRODUCTION

All drivers are familiar with the white "fog line"[1] that separates the road from the shoulder. What Missouri drivers may *not* be familiar with is the fact that they can be pulled over any time one of their tires cross that line. This fact may surprise Missouri drivers, in part because it has only recently become the law. While fog line infractions may seem trivial on their face, the traffic stops that result from fog line infractions trigger significant constitutional repercussions.

The Constitution of the United States provides that all people have certain, fundamental freedoms, and these freedoms include protection from unreasonable searches and seizures.[2] While the Fourth Amendment has been read to require that police officers obtain warrants before searching or seizing personal property,[3] courts have carved out exceptions to this requirement when certain criteria are met.[4] One such exception allows for police officers to stop drivers when the officer reasonably suspects that the driver has broken the law.[5] This "reasonable suspicion" standard is often contested by criminal defendants who argue that they should not be found guilty of their particular

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1. A "fog line" is a "white line that demarcates the shoulder from the road." Richie v. Dir. of Revenue, 987 S.W.2d 331, 333 (Mo. 1999) (en banc).

2. U.S. CONST. amend. IV.

3. *See* Groh v. Ramirez, 540 U.S. 551, 557 (2004); State v. Pike, 162 S.W.3d 464, 472 (Mo. 2005) (en banc).

4. *See, e.g.*, Chimel v. California, 395 U.S. 752, 762 (1969); Terry v. Ohio, 392 U.S. 1, 22 (1968).

5. *See, e.g.*, United States v. Arvizu, 534 U.S. 266, 273 (2002)

offense because the arresting officer was not justified in stopping them in the first place.[6]

Throughout the country, criminal defendants have often succeeded in arguing a lack of reasonable suspicion in "fog line" cases.[7] Criminal defendants and legal scholars alike reason that because state statutes typically do not criminalize brief deviations over the fog line, police officers lack reasonable suspicion when they base traffic stops on fog line violations alone.[8] Missouri courts in particular have "consistently ruled in favor of defendants who were stopped based on alleged fog line [sic] violations."[9] In fact, Missouri courts have regularly held that police officers lacked the reasonable suspicion required by the Fourth Amendment even when drivers crossed the fog line *more than* once.[10]

In *State v. Smith*, the Supreme Court of Missouri reviewed the trial court's finding that one single crossing of the "fog line" by one tire provides sufficient probable cause for an officer to conduct a traffic stop.[11] The majority of the court held that the trial court did not abuse its discretion in finding that the traffic stop was justified.[12] A dissent by Judge Stith argued that the trial court erred by denying the defendant's motion to suppress evidence obtained through the traffic stop, which the dissent characterized as unconstitutional.[13] Part II of this Note examines the underlying facts of *Smith*. Part III analyzes the legal background of reasonable suspicion, focusing in particular on both the constitutional provisions relating to reasonable suspicion and the Missouri precedent that the Supreme Court of Missouri was bound by. Part IV discusses the Supreme Court of Missouri's decision in *Smith*. Finally, Part V argues that the majority's opinion went against the great weight of Missouri precedent in holding that fog line infractions are sufficient probable cause for traffic stops.

II. FACTS AND HOLDINGS

On January 8, 2017, Sergeant Steven Johnson of the Missouri State Highway Patrol stopped Anthony Smith on the side of Interstate 70 in

6. *See* Melanie D. Wilson, *"You Crossed the Fog Line!" – Kansas, Pretext, and the Fourth Amendment*, 58 U. KAN. L. REV. 1179, 1180–81 (2010); *see also* Illinois v. Wardlow, 528 U.S. 119, 125 (2000), United States v. Sokolow, 490 U.S. 1, 7 (1989).

7. Harvey Gee, *"U Can't Touch This" Fog Line: the Improper Use of Fog Line Violation as a Pretext for Initiating an Unlawful Fourth Amendment Search and Seizure*, 36 N. ILL. U. L. REV. 1, 6 (2016).

8. *Id.* at 2–3; *see, e.g.*, United States v. Colin, 314 F.3d 439, 444 (9th Cir. 2002).

9. Gee, *supra* note 7, at 3.

10. *See, e.g.*, State v. Roark, 229 S.W.3d 216, 220 (Mo. Ct. App. 2007); State v. Abeln, 136 S.W.3d 803, 812 (Mo. Ct. App. 2004); State v. Mendoza, 75 S.W.3d 842, 845 (Mo. Ct. App. 2002).

11. 595 S.W.3d 143 (Mo. 2020) (en banc).

12. *Id.* at 144.

13. *Id.* at 147.

Montgomery County, Missouri.[14] According to Johnson's testimony, Johnson noticed Smith's vehicle because Smith activated his turn signal, began to change lanes, and then turned his signal off before completing the lane change.[15] While observing Smith's vehicle, Johnson saw either both of the passenger side tires or one of the passenger side tires cross over the "fog line."[16] According to Johnson's testimony, Smith's tire crossed over the white line on the right side of the roadway such that there was pavement between the fog line and the tires.[17] Johnson stated that the tire was "no longer within the lane of traffic."[18] By all accounts, Smith's passenger-side tire crossed over the fog line one single time.[19]

After seeing Smith's tire cross over the fog line, Johnson pulled Smith over to the side of Interstate 70.[20] During the traffic stop, Johnson smelled marijuana coming from the inside of the vehicle.[21] As a result, Johnson asked Smith if he had been smoking marijuana.[22] Smith responded that he had smoked marijuana inside the vehicle during the previous week.[23] Smith also stated that there was marijuana in the vehicle.[24] Johnson searched the vehicle and found marijuana.[25] Specifically, Johnson found four marijuana cigarettes in a backpack in the passenger compartment, as well as approximately four pounds of marijuana in Smith's trunk.[26]

Smith was charged with felony possession of a controlled substance and possession of drug paraphernalia.[27] Prior to trial, Smith filed a motion to suppress physical evidence obtained from the search of his vehicle, as well as his own incriminating statements.[28] In support of his motion, Smith argued that "'[m]erely crossing the fog line is insufficient probable cause to initiate a traffic stop in Missouri, '[l]egally signaling an intention to change lanes creates no reasonable suspicion or probable cause'" sufficient for detention.[29]

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14. *Id.* at 148–49.

15. *Id.* at 144. The officer did not, however, state this as a reason for pulling Smith over. *Id.*

16. *Id.* There was some dispute on the record between whether Sgt. Johnson saw one or both of Smith's tires cross over the fog line. *Id.* at 148.

17. *Id.* at 144.

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

The circuit court denied Smith's motion to suppress.[30] The case proceeded to a bench trial for one count of possession of a controlled substance in violation of Section 579.015 of the Missouri Revised Statutes, and one count of possession of drug paraphernalia in violation of Section 579.074.[31] The trial judge found Smith guilty on both counts and sentenced him to seven years in prison for the first charge.[32] The sentence was suspended, and Smith was placed on probation for five years.[33] The trial court also imposed a $100 fine for Smith's possession of drug paraphernalia.[34]

Smith appealed his conviction, claiming that the circuit court erred in denying his motion to suppress.[35] Smith argued that Sgt. Johnson's traffic stop was unreasonable and constituted a violation of both his Fourth Amendment rights under the United States Constitution and his Section 15 rights under the Missouri Constitution.[36] Smith further argued on appeal that all evidence against him was illegally obtained, and the fruit of the poisonous tree doctrine should have prohibited the drugs and drug paraphernalia from being admitted.[37] The Missouri Court of Appeals for the Eastern District affirmed the trial court's decision without filing an extended opinion stating the principles of law applicable to the case.[38] The Supreme Court of Missouri granted transfer and affirmed the trial court's decision, holding that the officer had sufficient probable cause to stop Smith based solely on Smith's fog line transgression.[39]

III. LEGAL BACKGROUND

Over the years, federal and state courts have articulated various justifications for when officers can stop a vehicle. First, this Part discusses the Constitutions of both the United States and the State of Missouri in an attempt to provide some background into motorists' constitutional rights, with special attention paid to the development of the "reasonable suspicion" standard. Next, this Part introduces Missouri caselaw, highlighting cases from both the Supreme Court of Missouri and the Missouri Court of Appeals that discuss whether a vehicle crossing over the "fog line" is sufficient to justify a traffic stop.

30. *Id.*

31. State v. Smith, No. ED 106830, 2019 WL 661140 (Mo. Ct. App. Feb. 19, 2019), *reh'g and/or transfer denied* (Mar. 26, 2019), *transferred to Mo. S.Ct.,* 595 S.W.3d 143 (Mo. 2020), *reh'g denied* (Mar. 17, 2020).

32. State v. Smith, 595 S.W.3d 143, 144 (Mo. 2020) (en banc).

33. *Id.*

34. *State v. Smith*, No. ED 106830, 2019 WL 661140 at *1.

35. *Smith*, 595 S.W.3d at 144.

36. *Id.*

37. Brief for Appellant at 2, State v. Smith No. SC 97811 (Mo. 2020) (en banc).

38. *State v. Smith*, No. ED 106830, 2019 WL 661140 at *1.

39. *Smith*, 595 S.W.3d at 144.

A. Constitutional Background and Reasonable Suspicion

The Fourth Amendment of the United States Constitution guarantees the right of the people to be free from unreasonable searches and seizures.[40] The Fourth Amendment states that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated…"[41] The Fourth Amendment goes on to state that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."[42] Section 15 of the Missouri Constitution largely mirrors the Fourth Amendment of the United States Constitution, also providing that people should remain free from unreasonable searches and seizures.[43] Additionally, the Supreme Court of Missouri has held that the same analysis applies to cases under the Missouri Constitution as cases under the Fourth Amendment.[44]

Historically, the Supreme Court of the United States read the Fourth Amendment to mean that searches without warrants should be presumed unlawful unless the facts "unquestionably" show the government had probable cause.[45] Justice Jackson, writing for the United States Supreme Court in *Johnson v. United States*, articulated the policy underlying the Fourth Amendment's warrant requirement:

> The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn from a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue such a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers. . . . When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not a policeman or a government enforcement agent.[46]

The Court has stated that this policy reflects the values of the framers, noting that the authors of the Constitution fought for "a right of personal

40. U.S. CONST. amend. IV.
41. *Id.*
42. *Id.*
43. MO. CONST. Art. I, § 15 (2014).
44. *See* State v. Damask, 936 S.W.2d 565, 570 (Mo. 1996) (en banc).
45. Agnello v. United States, 269 U.S. 20, 33 (1925).
46. Johnson v. United States, 333 U.S. 10, 13–14 (1948).

security against the arbitrary intrusions by official power."[47] Again and again, the Court has emphasized that "[n]o right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interferences of others, unless by clear and unquestionable authority of law."[48]

Over the decades, both the Supreme Court of the United States and the Supreme Court of Missouri have continually reaffirmed that searches and seizures without warrants are presumptively unlawful.[49] The Court has stressed the policy that "deliberate, impartial judgment of a judicial officer [should] be interposed between the citizen and the police…"[50] The Court has also stated that "[t]o hold that an officer may act in his own, unchecked discretion upon information too vague and from too untested a source to permit a judicial officer to accept it as probable cause for an arrest warrant, would subvert this fundamental policy."[51]

The Court has held that searches conducted outside this judicial process are "*per se* unreasonable under the Fourth Amendment – subject only to a few specifically established and well-delineated exceptions."[52] The exceptions to the general rule are "jealously and carefully drawn," and in order for a search to qualify under one of the exceptions, "there must be a showing by those who seek exemption […] that the exigencies of the situation made that course imperative."[53] One such exception to the general rule involves investigatory detentions, commonly known as *Terry* stops.[54]

In *Terry v. Ohio*, the Supreme Court of the United States held for the first time that individuals could be stopped based on an officer's "reasonable suspicion" rather than probable cause.[55] In *Terry*,[56] an experienced detective was on a foot patrol when he noticed two men standing on a street corner.[57] After conferring with a third man, the two took turns walking up to a store window and peering inside.[58] As a result, the officer believed the men were

47. Coolidge v. New Hampshire, 403 U.S. 443, 455 (1971).

48. Union Pac. R. Co. v. Botsford, 141 U.S. 250, 251 (1891); *see also* Terry v. Ohio, 392 U.S. 1, 9 (1967); Johnson v. Barnes & Noble Booksellers, Inc., 437 F.3d 1112, 1116 (11th Cir. 2006).

49. *See* Katz v. United States, 389 U.S. 347, 358 (1967); *see also* State v. Pike, 162 S.W.3d 464, 472 (Mo. 2005) (en banc).

50. *Katz*, 389 U.S. at 357 (quoting Wong Sun v. United States, 371 U.S. 471, 481–82 (1963)).

51. *Wong Sun*, 371 U.S. at 482.

52. *Katz*, 389 U.S. at 357 (emphasis added); *see also* Audrey Benison et al., *Warrantless Searches and Seizures*, 87 GEO. L.J. 1124, 1137 (1999).

53. Coolidge v. New Hampshire, 403 U.S. 443, 455 (1971).

54. *See Pike*, 162 S.W.3d at 472.

55. *See* Terry v. Ohio, 392 U.S. 1, 30 (1968).

56. *Id.*

57. *Id.* at 5.

58. *Id.* at 6.

preparing to rob the store.[59] The officer approached the men, identified himself as a patrolman, and patted down the outside of the men's clothing.[60] The officer found revolvers on two of the men, and the men were subsequently charged with carrying concealed weapons.[61] Before trial, the defense moved to suppress the weapons, but the trial court denied the motion.[62] On appeal, the Supreme Court of the United States held that even absent probable cause, a police officer may detain a person and conduct a limited search for weapons if the officer reasonably believes the person being investigated is "armed and presently dangerous to the officer or to others."[63] The Court stated that in order to assess the reasonableness of an officer's conduct, courts must perform a balancing test between the public interest and the individual's right to personal security.[64] Further, the Court said that for officers to justify such intrusions, they must have more than a hunch.[65] Rather, they "must be able to point to specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant that intrusion."[66] Since *Terry*, the Court has gone on to extend the reasonable-suspicion requirement to automobile stops, among other things.[67]

When interpreting *Terry*'s reasonable-suspicion requirement, the Court has held that because the "balance between the public interest and the individual's right to personal security"[68] tilts in favor of a standard less than probable cause, the Fourth Amendment's requirements are satisfied if the stop is supported by a reasonable suspicion that criminal activity "may be afoot."[69] Additionally, the Court has emphasized that when making reasonable-suspicion determinations, courts should look at the "totality of the circumstances" of each case to see whether the officer had a "particularized and objective basis" for suspecting criminal activity.[70]

The idea is that the reasonable-suspicion standard allows officers to draw from their previous experiences and training to make inferences from all of the information that is available to them.[71] Although an officer's reliance on a mere "hunch" is not sufficient to justify a stop, the likelihood that a crime

59. *Id.* at 6.
60. *Id.* at 7.
61. *Id.*
62. *Id.* at 7–8.
63. *Id.* at 24.
64. *Id.* at 26–27.
65. *Id.* at 22.
66. *Id.* at 21.
67. *See generally* United States v. Arvizu, 534 U.S. 266, 276–77 (2002); United States v. Cortez, 449 U.S. 411, 421 (1981); Davis v. Mississippi, 394 U.S. 721, 727–28 (1969); *see also* Illinois v. Wardlow, 528 U.S. 119, 126 (2000); United States v. Sokolow, 490 U.S. 1, 11 (1989).
68. United States v. Brignoni-Ponce, 422 U.S. 873, 878 (1975).
69. *Sokolow*, 490 U.S. at 7 (quoting *Terry*, 392 U.S. at 30).
70. *Arvizu*, 534 U.S. at 273 (quoting *Cortez*, 449 U.S. at 417–18).
71. *Id.*

has taken place does not need to rise to the level required of probable cause – which would be required for an arrest – nor does it need to rise to the level of satisfying the preponderance of the evidence standard that the government would be held to when prosecuting a defendant.[72] The Court has recognized that the concept of reasonable suspicion is somewhat abstract; however, the Court has purposely avoided turning the standard into "a neat set of legal rules."[73]

Similarly, Missouri courts have interpreted *Terry* and other United States Supreme Court precedent to mean that police officers may conduct brief, investigatory stops of vehicles when they have "a 'reasonable suspicion' based on 'specific and articulable facts' that illegal activity has occurred or is occurring."[74] The question, then, is what specific and articulable facts are sufficient for an officer to adduce that illegal activity has occurred or is occurring.

B. Missouri Caselaw

Missouri courts have repeatedly held that "a traffic stop is not justified where the only articulable fact offered to support the conclusion of reasonable suspicion is that the tires of a motor vehicle crossed the fog line."[75]

In *State v. Mendoza*, the defendant was driving on the interstate when she passed a Missouri State Highway Patrol sergeant parked on the shoulder of the road.[76] The officer observed the defendant driving in the left-hand passing lane despite there being no cars in the right-hand lane.[77] As the defendant drove past where the officer was parked, the defendant's driver's-side tires "ran onto the yellow line of the shoulder."[78] The officer followed the defendant for two miles before initiating a traffic stop.[79] The sergeant's traffic stop and subsequent canine search of the defendant's vehicle yielded 111 pounds of marijuana.[80] Mendoza, the defendant, was charged with possession of marijuana and drug trafficking.[81] Mendoza filed a motion to suppress evidence, and the trial judge denied her motion.[82] Mendoza was convicted on both counts and appealed her conviction, claiming that the stop

72. *Id.* at 274; *see also Sokolow*, 490 U.S. at 7.

73. Ornelas v. United States, 517, U.S. 690, 695–96 (1996).

74. State v. Pike, 162 S.W.3d 464, 472 (Mo. 2005) (en banc) (quoting Terry v. Ohio, 392 U.S. 1, 21 (1967)).

75. State v. Beck, 436 S.W.3d 566, 568 (Mo. Ct. App. 2013) (citing State v. Roark, 229 S.W.3d 216, 220 (Mo. Ct. App. 2007)).

76. 75 S.W.3d 842, 843–44 (Mo. Ct. App. 2002).

77. *Id.* at 844.

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

had been pretextual.[83] The Missouri Court of Appeals for the Southern District reversed Mendoza's conviction, holding that despite the officer's observation that her tires had traveled onto the fog line, there was no justification for the officer to stop the defendant.[84]

In *State v. Abeln*, a state trooper was driving west on four-lane Highway 36 when he received a call from dispatch indicating that someone in a tan Carhartt coat had seemed suspicious when purchasing starter fluid at the local Orscheln Farm & Home store.[85] The call from dispatch indicated that the suspect had driven off in a burgundy pickup truck and had purchased funnels and hoses earlier in the week.[86] The trooper testified that moments later, a burgundy pickup truck passed in the eastbound lanes of Highway 36.[87] The trooper claimed that he could see the driver was wearing a tan Carhartt coat.[88] The trooper made a U-turn across the median so that he could follow the burgundy truck; however, the highway changed from four lanes to two lanes, and there was a vehicle between the trooper and the burgundy truck.[89] The trooper testified that he saw the driver, Abeln, reach toward the glove box in a suspicious manner.[90] Then, the trooper "observed on [two] occasions […] that the passenger side tires of the truck traveled over what is commonly referred to as the fog line."[91] The trooper subsequently made a traffic stop and found evidence that Abeln was attempting to produce a controlled substance with the intent to distribute.[92] Abeln filed a motion to suppress, claiming that the stop had been improper and violated his Fourth Amendment right to protection against unreasonable seizure.[93] The trial court sustained Abeln's motion and the state appealed that order.[94] The Missouri Court of Appeals for the Western District upheld the trial court's granting of Abeln's motion.[95] The appellate court found that Abeln's purchase of starter fluid,

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83. *Id. See, e.g.*, United States v. Jones, 275 F.3d 673, 680 (8th Cir. 2001).

84. *Mendoza*, 75 S.W.3d at 846.

85. State v. Abeln, 136 S.W.3d 803, 807 (Mo. Ct. App. 2004). Starter fluid is commonly used in production methamphetamine. Keegan Hamilton, *Methology 101: Old-school meth labs give way to "shake and bake"*, RIVERFRONT TIMES, (May 29, 2010), https://www.riverfronttimes.com/stlouis/methology-101-old-school-meth-labs-give-way-to-shake-and-bake/Content?oid=2483461 [https://perma.cc/KAU7-WE6A].

86. *Abeln*, 136 S.W.3d at 807.Funnels and tubes of this nature are commonly used in the production methamphetamine. Hamilton, *supra* note 85.

87. *Abeln*, 136 S.W.3d at 807.

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.* Based on information that Abeln was involved in the local methamphetamine trade, the officer believed the items Abeln had purchased were likely going to be used to produce methamphetamine. *Id.*

93. *Id.*

94. *Id.*

95. *Id.* at 814.

along with his previous purchases of hoses and funnels, did not give the trooper reasonable suspicion that Abeln was involved in criminal activity.[96] The court went on to say that the fact Abeln had reached into his glove box while driving and crossed the fog line twice did "not add enough to the equation to give rise to a reasonable suspicion of criminal activity."[97]

In *State v. Roark*, a state trooper received a call from dispatch that a possibly intoxicated driver had been driving on Highway 50 toward Sedalia.[98] The report included a vehicle description and license plate number that matched the defendant's vehicle.[99] The trooper positioned his vehicle so that he could see Roark's vehicle approach.[100] After Roark passed the trooper, the trooper pulled into the heavy traffic on Highway 50 some distance behind Roark's vehicle.[101] At trial, the state trooper testified that the passenger-side tires of the Roark's vehicle crossed the fog line twice.[102] The trooper stated that the tires crossed onto the paved shoulder of the road, but none of the surrounding traffic was forced to take evasive action.[103] Roark subsequently pulled into a hotel and parked his vehicle.[104] Roark entered the hotel, and the state trooper followed Roark inside.[105] The trooper found Roark at the hotel bar and explained that dispatch had received a call about a drunk driver.[106] The trooper asked Roark to come outside because the officer "needed to conduct an investigation to determine if he was, indeed, intoxicated."[107] Once outside, the trooper conducted field sobriety tests and placed Roark under arrest.[108] The trial court overruled Roark's motion to suppress, and he was subsequently convicted.[109] Roark appealed, arguing the trooper lacked probable cause and the necessary reasonable suspicion for an investigatory stop.[110] The Missouri Court of Appeals for the Western District acknowledged that the only articulable fact offered to support the trooper's reasonable suspicion was the transgression of Roark's tires over the fog line.[111] The court held that the trooper was not "aware of articulable facts that

96. *Id.* at 812.
97. *Id.*
98. State v. Roark, 229 S.W.3d 216, 217 (Mo. Ct. App. 2007).
99. *Id.*
100. *Id.*
101. *Id.*
102. *Id.*
103. *Id.*
104. *Id.*
105. *Id.*
106. *Id.*
107. *Id.* at 217–18.
108. *Id.* at 218.
109. *Id.*
110. *Id.* at 217.
111. *Id.* at 220.

would 'warrant a man of reasonable caution in the belief' that an offense had been committed."[112]

In *State v. Beck*, the defendant was headed west on a state highway as a police officer was headed east on the same road.[113] The officer noticed that the defendant's pickup truck was driving over the fog line that separated the shoulder of the road from the driving lane.[114] The officer turned around, caught up with the defendant, and stopped the defendant's car.[115] Beck was subsequently arrested for driving while intoxicated.[116] Prior to trial, the defendant filed a motion to suppress arguing that the mere touching or crossing of a fog line cannot justify a traffic stop.[117] The trial court granted the motion to suppress, and the state appealed.[118] The Missouri Court of Appeals for the Southern District affirmed the trial court's decision to grant the motion to suppress.[119] In support of its decision, the Southern District in *Beck* cited to *State v. Roark*,[120] *State v. Abeln*,[121] and *State v. Mendoza*.[122] The court stated that because the officer had observed only "mere touching or crossing the fog line," and because previous Missouri precedent has continually said that the mere crossing of the fog line is insufficient for establishing reasonable suspicion, the trial court did not err.[123]

These Missouri appellate court cases illustrate one central rule: the momentary transgression of a vehicle over the fog line, even when coupled with other suspicious behavior, is insufficient to establish the necessary reasonable suspicion to stop a Missouri driver. However, the Supreme Court of Missouri had not ruled on the issue until it heard *State v. Smith*.

IV. INSTANT DECISION

The Supreme Court of Missouri was tasked with determining whether the mere deviation of one tire over the fog line could justify a traffic stop.[124] The court reasoned that if the police officer *did* have reasonable suspicion to believe Smith had committed a traffic violation, the traffic stop would be justifiable under the Fourth Amendment and the subsequent discovery of marijuana would not be subject to exclusion.[125] Therefore, the court's

112. *Id.* at 222 (quoting Beck v. Ohio, 379 U.S. 89, 96 (1964)).
113. State v. Beck, 436 S.W. 3d 566, 568 (Mo. Ct. App. 2013).
114. *Id.*
115. *Id.*
116. *Id.*
117. *Id.*
118. *Id.*
119. *Id.* at 569.
120. 229 S.W.3d 216, 220 (Mo. Ct. App. 2007).
121. 136 S.W.3d 803, 812 (Mo. Ct. App. 2013).
122. 75 S.W.3d 842, 845 (Mo. Ct. App. 2002).
123. *Beck*, 436 S.W. 3d at 568.
124. *Id.* (quoting Nardone v. United State, 308 U.S. 338, 341 (1939)).
125. *Id.* at 145–46.

analysis hinged on whether crossing the fog line and driving momentarily on the shoulder constitutes a violation of Missouri law.[126]

A. The Principal Opinion

To determine whether crossing the fog line violates Missouri law, the court turned to Section 304.015 of the Missouri Revised Statutes.[127] Smith's argument was that "[m]erely touching or crossing the fog line does not give reasonable suspicion that any crime or traffic offense has occurred."[128] The State, on the other hand, contended that crossing the fog line and driving on the shoulder – however briefly – is a violation of Section 304.015.[129] The court was tasked with determining whether "crossing the fog line and driving on the shoulder contravenes [Section 304.015] and constitutes a traffic violation."[130] In doing so, the court acknowledged that its task was one of statutory interpretation.[131]

The court noted that "the goal of statutory interpretation is to give effect to the [state legislature's] intent as reflected in the plain language of the statute at issue."[132] Section 304.015.2 states that "upon all public roads or highways of sufficient width a vehicle shall be driven upon the right half of the roadway[.]"[133] Section 304.001(12) defines "roadway" as "that portion of a state highway ordinarily used for vehicular travel, exclusive of the berm or shoulder."[134] The "fog line" is the "white line that demarcates the shoulder from the road."[135]

However, Section 304 of the Missouri Revised Statutes does not provide a definition of the word "drive."[136] When a term is not defined in a statute, the court must give the term its "plain and ordinary meaning as derived from the dictionary."[137] In analyzing this case, the court looked to Webster's dictionary, which defines the verb "drive" as "to operate the mechanism and controls and direct the course of" a motor vehicle.[138] Subsequently, the court reasoned that operating and directing the course of a vehicle on the shoulder

126. *Id.* at 146.

127. *Id.*; *see* MO. REV. STAT. § 304.015 (2018).

128. *Smith*, 595 S.W.3d at 146.

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.* (quoting State v. Jones, 479 S.W.3d 100, 106 (Mo. 2016) (en banc)).

133. *Id.* (quoting MO. REV. STAT. § 304.015).

134. *Id.* (quoting MO. REV. STAT. § 304.001.12).

135. *Id.* (quoting Riche v. Dir. Of Revenue, 987 S.W.2d 331, 333 (Mo. 1999) (en banc)).

136. *Id.*

137. *Id.* (quoting Mo. Pub. Serv. Comm'n v. Union Elec. Co., 552 S.W.3d 532, 541 (Mo. 2018) (en banc)).

138. *Id.* (quoting WEBSTER'S NEW INT'L DICTIONARY 692 (3d ed. 2002)).

by allowing it to cross over the fog line is a violation of Section 304.015.2.[139] Because Section 304.015.9 states that a violation of Section 304.015 is a class C misdemeanor, the court held that the momentary crossing of the fog line is not just a traffic violation, but a *crime* for which drivers can be jailed for fifteen days, fined $750, or both.[140] As a result of this interpretation, the court held that the mere crossing of a fog line is a violation of the law sufficient to justify a traffic stop.[141]

In applying Section 304.015 to the facts of this case, the court held that Smith's crossing of the fog line and thereby "operating and directing the course of his vehicle on the shoulder" was a violation of Missouri law.[142] Because Smith had violated the law, the court avoided reasonable suspicion analysis and held that there was actual probable cause for the officer to stop Smith.[143] As a result, the court concluded that the stop in this case did not constitute an unreasonable seizure under the Fourth Amendment, and the circuit court did not err in denying Smith's motion to suppress.[144]

B. The Dissenting Opinion

Judge Laura Denvir Stith dissented, arguing that the principal opinion was incorrect in finding that one tire momentarily crossing the fog line gave probable cause to believe Smith had violated Section 304.015.2.[145] Judge Stith first addressed the statutory interpretation, arguing that Section 304.015 does not state that one tire crossing the fog line is a traffic violation; rather, it provides that cars must be driven "upon the right half of the roadway."[146] Judge Stith wrote that the majority opinion cited no authority in support of the idea that one momentary crossing of the fog line by a vehicle's tire constitutes a failure to "'drive' on the right half of the roadway."[147] While the majority relied on a dictionary definition of drive – "'to operate the mechanism and controls and direct the course of' a motor vehicle" – Judge Stith argued that this definition merely raises the question as to what constitutes "operation" or "direction."[148]

Judge Stith also made a notice argument.[149] Judge Stith pointed out that the law only requires drivers to drive on the roadway, as close as practicable to the right hand of the road, but this definition fails to provide Missouri drivers with notice that if any "particular part of the vehicle goes over the fog

139. *Id.*
140. *Id.*
141. *Id.*
142. *Id.*
143. *Id.*
144. *Id.*
145. *Id.* at 147–48 (Stith, J., dissenting).
146. *Id.* at 148.
147. *Id.*
148. *Id.* at 149.
149. *Id.* at 149–50.

line, no matter how insignificantly, then even though the remainder is in the right-hand lane, the driver would be guilty of directing the course of his or her vehicle off the roadway."[150] Judge Stith also suggested that if the legislature had intended the statute to read this way, the legislature simply could have made it do so explicitly.[151]

In addition to the statutory interpretation analysis, Judge Stith also addressed Missouri precedent.[152] Judge Stith highlighted that Missouri courts have continually held that such a minor deviation of a tire crossing onto the shoulder for a moment does *not* constitute a traffic offense.[153] Judge Stith summarized the principal opinion as follows:

> No authority is cited that one momentary crossing of the fog line by a vehicle's tires (if such a crossing even occurred here) constitutes failing to "drive" on the right half of the roadway. To the contrary, prior cases from this Court assume, and prior cases of the court of appeals and other jurisdictions hold, that such minor deviations of a tire onto the shoulder do not constitute a traffic offense. This Court should also so hold.[154]

Judge Stith noted that Missouri courts have been using a well-established rule that "traffic laws 'are not unyielding and inflexible and are not to be applied rigidly, absolutely and peremptorily without regard to circumstances or conditions there existing.'"[155] Rather, Judge Stith noted that Missouri law is well settled that courts should interpret statutes in a way that is not hyper-technical, but instead based on reason and logic.[156] If the court examined this case in such a manner, and had not rigidly read the term "drive" to include a tire briefly touching a surface, Judge Stith argued the principal opinion would have found that a momentary transgression of a tire over a fog line is *not* a specific and articulable reason sufficient for reasonable suspicion.[157]

V. COMMENT

The precedent established by the Supreme Court of Missouri's decision in *Smith* leaves Missouri drivers vulnerable to unfettered police and prosecutorial discretion. By allowing police officers to conduct traffic stops based solely on the observation that one tire of a vehicle momentarily crossed

150. *Id.*

151. *Id.* at 150.

152. *Id.*

153. *Id.*

154. *Id.* at 148.

155. *Id.* at 150 (quoting Leonard v. Gordon's Transp., Inc., 575 S.W.2d 244, 249 (Mo. Ct. App. 1978)).

156. *Id.* (citing Fred Weber, Inc. v. Dir. Of Revenue, 452 S.W.3d 628, 630 (Mo. 2015) (en banc)).

157. *Id.* at 154.

the fog line, the court overturns decades of Missouri precedent and degrades the constitutional protections of drivers in the process. The principal opinion's holding that the single, momentary crossing of the fog line by one tire of a vehicle constitutes a violation of Missouri law sufficient for constitutionally required reasonable suspicion is unsound because it (a) misinterprets the applicable Missouri statute, (b) fails to account for Missouri court precedent, and (c) creates bad law.

A. Statutory Interpretation

Missouri law does not state that the momentary crossing of the fog line by one of a vehicle's tires is a violation of the law. As a result of this statutory absence, the majority opinion pieces together different Missouri statutes and external definitions in an attempt to judicially create a new traffic violation.

Section 304.015 of the Missouri Revised Statutes states plainly that "upon all public roads or highways of sufficient width a vehicle shall be driven on the right half of the roadway[.]"[158] Because this statute lacks significant detail, the court turned to external sources to interpret the words "drive" and "roadway."[159] Section 304.001(12) defines "roadway" as "that portion of a state highway ordinarily used for vehicular travel, exclusive of the berm or shoulder."[160] Because this chapter of the Missouri statutes fails to define the word "drive," the court turned to a dictionary, which provided that to drive means to "'operate the mechanism and controls and direct the course of' a motor vehicle."[161] After piecing together these definitions, the court concluded that Section 304.015 requires Missouri drivers to never cross the fog line with any portion of their vehicle for any period of time.[162] The court concluded that if any part of any vehicle does cross over this fog line for any period of time, then the driver is in violation of Section 304.015, is guilty of a class C misdemeanor, can be justifiably stopped by police officers, and can be subsequently jailed and fined.[163]

Judge Stith's dissent pointed out the substantial flaws in this logic, calling into question the statutory interpretation upon which the majority's conclusion is based:

> The principal opinion focuses on the word "roadway" and correctly notes that section 304.001(12) defines "roadway" as "that portion of a state highway ordinarily used for vehicular travel, exclusive of the berm or shoulder." Therefore, the statute requires a car to be driven on the roadway, not the shoulder. But that merely begs the question at

158. MO. REV. STAT § 304.015 (2018).

159. *Smith*, 595 S.W.3d at 146.

160. § 304.001(12).

161. *Smith*, 595 S.W.3d at 146 (quoting WEBSTER'S NEW INT'L DICTIONARY 692 (3d ed. 2002)).

162. *Id.*

163. *Id.*

> issue here – whether Mr. Smith was "driving" on the shoulder merely because one or two of his tires allegedly inadvertently crossed over the fog line for an instant.[164]

Judge Stith argued that the majority's reliance upon Webster's definition of "drive" fails to adequately answer this question, stating that "[t]his definition […] begs the question as to what constitutes operating or directing the course of a motor vehicle off the roadway."[165] Judge Stith's argument essentially comes down to the idea that a momentary crossing of the fog line by any part of a vehicle for any period of time cannot be considered "operating or directing" the motor vehicle off of the road.

The majority opinion was wrong in stating that the mere momentary drift of any part of a vehicle over the fog line constitutes "driving." If a tire, for one split second, goes over the fog line, that can hardly be considered "operating or directing" the motor vehicle off of the road. Holding differently goes against a typical Missourian's understanding of the word "drive," as well as the intent of the legislature that drafted these applicable statutes. If the legislature had intended for such minor deviations over the fog line to constitute a violation of Missouri law, it could have crafted the applicable statutes in a manner that makes that requirement clear. Piecing together different statutory provisions with different external definitions is a means of circumventing the legislative intent, holding without basis that the mere drifting of one tire over a line somehow constitutes the operation of a vehicle off a road.

The majority's interpretation of Section 304.015 is also inconsistent with the common understanding of Missouri traffic laws.[166] Normal Missouri drivers occasionally cross over fog lines while driving. No one is a perfect driver, so it makes sense that occasional momentary transgressions will happen. That is the very reason that lines and rumble strips are there in the first place – to warn drivers when they have momentarily drifted too far. Should the momentary drifting of even one tire across a fog line, however brief, constitute a violation of Missouri law sufficient to allow police officers to pull drivers over, search their vehicles, and put them in jail? A normal Missouri driver would answer "no," and because the legislative intent would seem to agree, the Supreme Court of Missouri was wrong to hold otherwise.

B. Missouri Precedent

Decisions by lower Missouri courts have interpreted Section 304.015 in a manner more consistent with the clear legislative intent and the general understanding of the driving public. Missouri courts have long held that the mere momentary crossing of one tire over a fog line, even in conjunction with other suspicious behavior, is an insufficient basis for reasonable suspicion.

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164. *Id.* at 149.

165. *Id.*

166. *See id.* at 150 (Stith, J., dissenting).

This is because merely crossing the fog line is not an *explicit* violation of Missouri law. This repeated lower court interpretation makes sense because the Missouri Revised Statutes do not criminalize such behavior, as discussed above.

While the Supreme Court of Missouri is certainly not bound by the Missouri Court of Appeals, it should have taken the lower courts' opinions – based on plain meaning and sound interpretations of the legislative intent – into account when deciding *Smith*. However, the majority's holding in *Smith* effectively ignored this Missouri precedent without giving a reason for doing so. This refusal to address previous Missouri cases led the court to baselessly hold that the momentary transgression of one tire over a fog line is sufficient for reasonable suspicion. To protect the constitutional rights of Missouri drivers, the Supreme Court of Missouri should not have made such a deviation from Missouri precedent.

Based on a review of both the majority and the dissenting opinions, as well as analysis of the Missouri precedent cited by Judge Stith, the majority's holding in *Smith* is against the great weight of Missouri precedent. Missouri cases have continually held the brief crossing of the fog line does not violate any Missouri statute. On the contrary, lower Missouri appellate courts have repeatedly held that the crossing of a fog line *more than* once, even in conjunction with other suspicious behavior, does not rise to the level of reasonable suspicion required for investigatory stops. Holding to the contrary is completely illogical based on the definitions provided by the majority in support of their decision. The Supreme Court of Missouri's holding in *Smith* reduces the constitutional rights guaranteed to all Missouri drivers. As such, Judge Stith's argument should have prevailed in holding that the momentary transgression of one tire over the fog line is insufficient as the basis for reasonable suspicion required to initiate a traffic stop.

C. Creation of Bad Law

In ignoring the legislative intent and applicable precedent, the principal opinion in *Smith* created bad law. The principal opinion created a new rule allowing for Missouri drivers to be stopped, searched, fined, and jailed simply because they let one of their tires briefly cross over the fog line. This rule is bad on its merits and will undoubtedly be a shock to any driver against whom it is used.

It is ridiculous to hold that any person who lets one of their tires briefly cross the fog line can be jailed for doing so, and while prosecutors may not actually fine or jail defendants for crossing the fog line, that is exactly what the Supreme Court of Missouri has allowed. Are we to believe that those who let their cars drift a few inches too far should be put in jail to rehabilitate from their illegal activity? Are we to believe that those who cross over the fog line are so dangerous that they should be locked up to keep the rest of us safe? Of course not. Such a rule clearly goes against logic and reason and has no place in Missouri law. Drivers sometimes cross the fog line, and a rule that allows

the criminal justice system to use unfettered discretion in stopping, searching, fining, and jailing them for doing so is appalling.

VI. CONCLUSION

In *State v. Smith*, the Supreme Court of Missouri upheld the trial court's decision to deny Smith's motion to suppress evidence of his stop, holding that the momentary crossing Smith's tire over the fog line constituted a violation of Missouri law sufficient for a showing of reasonable suspicion. The court's decision goes against the great weight of Missouri case precedent. As a result, the court's decision sets a new standard – one that allows police officers to conduct traffic stops, search vehicles, and put people in jail any time they allege to have seen a tire cross across a fog line. This precedent substantially damages Missouri drivers' fundamental freedoms provided by the Constitution of the United States, and it sets a dangerous standard for cases to come.